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SETTLEMENT COMMUNICATION SUBJECT TO FED. R. EVID. 408

July 29, 2011

Donald G. Frankel
U.S. Department of Justice
Environmental and Natural Resource Division
Boston Field Office
One Gateway Center
Suite 616
Newton Corner, MA 02458

Re: Contractual obligations concerning the Arecibo Municipal Solid Waste Landfill- Gas Collection and Control System (GCCS)

Dear Mr. Frankel:

As you know, we discussed recently the matter of reference in telephone conferences. On behalf of Landfill Technologies of Arecibo (LTA), we agreed during our conferences to submit our LTA's position in writing concerning the responsibilities for the installation of a gas collection and control system (GCCS) in the Municipal Solid Waste (MSW) Landfill under the existing contract (the Contract) with the Municipality of Arecibo.

Previously, on a letter dated March 15, 2011 addressed to you, we discussed each of the ongoing and pending tasks at the Landfill and we included a series of site plans. In that letter, we identified which party was responsible for the performance of the pending tasks in accordance with the terms and conditions of the contract signed on July 12, 1999. LTA has repeatedly informed the Municipality of Arecibo in writing and during meetings with its representatives that, in accordance with the terms and conditions of the existing contract, the closure of the Landfill and the post-closure care activities are the responsibility of the Municipality. See, Article 10.04 of the Contract, at page 22. Likewise, LTA has repeatedly informed the Municipality of its responsibilities regarding the installation of a GCCS at the Landfill.

Governing contract language

In summary, it is our position that both federal and local regulations covering GCCS requirements for MSW landfills became applicable to the Arecibo landfill after the date of the contract's effectiveness (July 12, 1999). In accordance to the "Changes in Law"¹ and capital improvements provisions of the contract, LTA was required to perform those capital improvements required by the applicable law at the time of the contract's execution. See Contract, Article 1.00, page 3 and Article 10.01, page 21. The contract further states that LTA will not have any additional obligations regarding capital improvements other than those required by applicable law at the time the parties signed the contract. See, Contract, Article 10.01. Hence, the contract's language is clear, unambiguous and exclusive in terms of the responsibilities assumed by LTA when it entered into the agreement on July 12, 1999.

Applicable regulatory scheme

On March 12, 1996 the EPA promulgated emission guidelines (61 FR 9905) for existing Municipal Solid Waste (MSW) landfills (40 CFR Part 60, subpart Cc) under authority of section 111 of the Act. The guidelines apply to existing MSW landfills that:

- (i) Commenced construction, modification, or reconstruction before May 30, 1991;
- (ii) Have not been modified or reconstructed since May 30, 1991; and
- (iii) Have accepted waste since November 8, 1987 or have additional capacity for future waste deposition.

To make the guidelines enforceable, states with existing MSW landfills subject to the emission guidelines, such as the Arecibo MSW landfill, were required to submit to EPA a State plan that implements and enforces the emission guidelines within 9 months of promulgation of the guidelines or by December 12, 1996. However, the Puerto Rico Environmental Quality Board ("PREQB" or "EQB"), the designated agency in charge of developing the State plan for existing MSW landfills, failed to prepare and submit to EPA such plan by December 12, 1996.

Under Section 111 of the Act and 40 CFR 60.27(c) and (d), EPA is required to develop, implement, and enforce a Federal plan for existing MSW landfills located in a State that does not have an approved State plan. EPA finally

¹ Counsel's translation:

"Change of Law signifies any of the following events or conditions that have, or that reasonably could be expected to have, an effect on the execution of the respective obligations of the parties under the Contract (with the exemption of payment obligations):

(1) The adoption, promulgation, issuance, modification, written change in the interpretation of any applicable law or administrative or judicial law on or after the day of this contract.

(2)..."

promulgated the Final MSW landfills Federal Plan on November 8, 1999, becoming effective on January 7, 2000². Notwithstanding, the Federal plan, by its own terms, is no longer applicable to a MSW landfill covered by an approved State plan that becomes effective after promulgation of the Federal plan, consistent with Congress's overarching intent that the primary responsibility for air pollution control rests with State and local agencies.³ Puerto Rico's MSW landfill plan was approved by EPA on July 16, 2002. Thus, upon the effective date of the Puerto Rico Plan, Part VII of EQB's Regulation for the Control of Atmospheric Pollution (RCAP) became applicable to the Arecibo MSW landfill in lieu of EPA's Subpart GGG provisions which became ineffective and inapplicable.

As previously stated, EPA approved Puerto Rico's State Plan for the Implementation of MSW Landfill Emission Guidelines on July 16, 2002. The State Plan or "SIP" included local regulations codified as Part VII of the RCAP. Part VII Regulations became effective in Puerto Rico as of August 15, 2002. These regulations adopted by PREQB provide operating standards for GCCS, along with associated testing, monitoring, record-keeping and reporting requirements. As a result, LTA did not have an obligation when it signed the contract in the summer of 1999 to perform any capital improvements related to the installation and operation of a GCCS at the MSW Landfill of Arecibo. Contrary to the statements made by the Municipality and its legal representatives in their letter dated June 3, 2011, LTA did not have a contractual obligation to perform capital improvements related to the GCCS requirements because such requirements were not "applicable law", as the term is explicitly defined under the contract, on the effective date of the contract on July 12, 1999. Arecibo's counsel's reliance on a rule adopted by EPA on March 12, 1996, is unsupported and groundless as the rule's applicability and enforceability was contingent on either one of the following two events that were uncertain and undefined at the time of the Arecibo MSW landfill contract's execution:

- (1) promulgation by EQB of appropriate regulations under State law applicable to existing MSW landfills adopting the emission guidelines, and its approval by EPA as the Puerto Rico MSW Landfills Plan, or
- (2) promulgation by EPA of a Federal plan for existing MSW landfills located in a State that does not have an approved State plan, such as in the case of Puerto Rico, as required under section 111 of the Act and 40 CFR 60.27(c) and (d) that EPA is required to develop, implement, and enforce. Eventually, EPA promulgated the Final MSW landfills Federal Plan on November 8, 1999, becoming effective on January 7, 2000, six months after the Contract.

Had the GCCS requirements been in effect at the time LTA and the Municipality of Arecibo negotiated the contract terms and conditions, this issue would have

² Codified in 40 CFR 60 Subpart GGG.

³ See 63 FR 69375, December 16, 1998 and CAA Section 101(a) (3).

been explicitly addressed in the contract, just as other matters connected to ordinary and capital improvements were dealt with in good faith, clearly and properly referenced in the agreement. Considering the Contract's "Change of Law" provisions together with the explicit language of its Article 10.01 stating that LTA will not have any additional obligations regarding capital improvements at the Arecibo MSW landfill other than those required by applicable law at the time the parties signed the contract, there was certainly no contractual obligation in the part of LTA to perform any capital improvements related to the installation and operation of a GCCS at the time the parties entered into the agreement. Moreover, at the time LTA signed the contract with the Municipality of Arecibo in the summer of 1999, LTA did not have enough facts and data from the Municipality of Arecibo or the agencies with jurisdiction to determine if and when the GCCS requirements would become applicable in the future to the Arecibo MSW landfill considering that such event was contingent on the promulgation of future new rulemaking by either EPA or EQB, agency actions that are categorized under the contract as a "Change of Law".

As stated in your letter dated March 5, 2010, EPA issued a federal plan on November 8, 1999 to implement the Emission Guidelines for existing MSW landfills located in states where state plans were not yet in effect. See also, 64 Fed. Reg. 60689. The effective date of the federal plan was January 7, 2000, or six months after the effectiveness of the Contract. According to this plan, MSW landfills that began construction prior to May 30, 1991, and had a design capacity greater than 2.5 million megagrams and 2.5 million cubic meters were required to submit an initial design capacity report and other documentation to EPA by April 6, 2000. 40 C.F.R. § 62.14355.

At the time of the approval of the Federal Plan in November 8, 1999⁴, the Arecibo MSW landfill was not subject to any federally enforceable landfill gas control system requirement. After the PR Plan was adopted by EPA on July 16, 2002⁵, LTA submitted to the PREQB on May 5, 2003 an Initial Design Capacity Report for the Arecibo MSW landfill. Owing to a number of reasons⁶ principally associated with the "Operación Cumplimiento" Program adopted by EQB with EPA's endorsement, the GCCS Plan for the Arecibo MSW landfill was not submitted to EQB by LTA until August 2008.

In summary, it is our understanding that any contractual controversy regarding the installation and operation of a GCCS in the Arecibo MSW Landfill should be governed by the clear and explicit language of the "Changes in Law" provisions

⁴ Effective on January 7, 2000 or six months after the Arecibo contract execution.

⁵ By virtue of its own terms, after this date the Federal MSW Landfill Plan became ineffective in Puerto Rico. (See, 64FR 60691).

⁶ We intend to separately provide information and supporting documentation related to the "Operación Cumplimiento" issue.

of the contract. Specifically, Article 15.01 of the referenced contract states that Changes in Law shall require an agreement by the parties as to the implications of such a change in the applicable law. See Contract, Article 15.01, at page 28. As recent as March 29, 2011, we reviewed once more the responsibilities of each party during a meeting held with representatives of the Municipality. We also discussed the site-specific improvements that LTA considers should be implemented at the Arecibo MSW Landfill in order to address the existing RCRA deficiencies that were identified after the completion by LTA of the immediate corrective measures. However, as of today LTA and the Municipality of Arecibo have not yet been able to reach an agreement as to these important matters.

As mentioned previously, LTA has agreed in good faith to cover the remaining installation costs of the GCCS after deducting any contributions obtained from the federal ARRA funds or Stimulus moneys assigned for this project. There are certainly no contractual obligation in the part of LTA to perform any capital improvements related to the installation and operation of a GCCS in the Arecibo MSW landfill. However, this voluntary good faith undertaking by LTA should not be considered as an acceptance of any contractual duty to perform tasks and activities beyond the existing contract, but as a good faith effort to achieve compliance.

We appreciate your time and attention to these important matters and hope to discuss this matter with you in the near future. Please let us know if you have any questions or need additional information.

Cordially,



Francis Torres

- c. Carolina Jordán García, EPA
- Lourdes Rodríguez, EPA
- Hon. Lemuel Soto, Municipality of Arecibo
- Eliezer Aldarondo and Marla Hadad, Counsels for Arecibo
- Rey Contreras, LTA
- Javier Vázquez, LTA